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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

FRANCINE TAFFLIN, *et al.*,

Petitioners,

v.

JEFFREY A. LEVITT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming the dismissal of Petitioners' claim under the Securities Exchange Act of 1934, 15 U.S.C. §78 *et seq.*, on the ground that the certificates of deposit purchased by Petitioners from a non-federally-insured savings and loan institution are not securities despite the absence of an effective and comprehensive regulatory and insurance system in the State of Maryland.

2. Whether the Court of Appeals erred in holding that federal courts do not have exclusive jurisdiction over civil actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-68, and that state courts have concurrent jurisdiction over such actions.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioners

A(1). Plaintiffs in No. 88-3019 below:

Francine Tafflin; Seymour Zuckerman; Eris Zuckerman; Renalee Selvin; Joan Zuckerman; Sylvia Zuckerman; Seymour Zuckerman, Executor of the Estate of Samuel Zuckerman; George R. Lyon; George C. Lyon; Peter M. Lyon; Bruce K. Lyon; Elizabeth A. Lyon; George R. Lyon and Mary G. Lathrop, Personal Representatives of the Estate of George M. Lyon; Kent H. Butcher; Stanley Z. Felsenberg, M.D., Personal Representative of the Estate of Minnie Felsenberg; Margaret Graves; Thurman L. Graves; Sandra L. Pletka; Gertrude Durso; Enterprise Equipment Co., Inc.;* Carmen R. Goldings; Clelia S. Goldings; Ethan D. Goldings; Herbert J. Goldings, M.D.; Sarah M. Goldings; Doris Konig; Windell R. Carter; Catherine Carter; Mitchell W. Landy; and Rio Grande Savings & Loan Association,* individually and as representatives of a class of purchasers of Old Court certificates of deposit (*see* Amended Complaint in Maryland Federal District Court No. B-87-668, ¶ 1).

A(2). Plaintiffs in No. 88-3020 below:

Francine Tafflin; Seymour Zuckerman; Eris Zuckerman; Renalee Selvin; Joan Zuckerman; Sylvia Zuckerman; Seymour Zuckerman, Executor of the Estate of Samuel Zuckerman; George R. Lyon; George C. Lyon; Peter M. Lyon; Bruce K. Lyon; Elizabeth A. Lyon; George R. Lyon and Mary G. Lathrop, Personal Representatives of the Estate of

George M. Lyon; Gertrude Durso; Enterprise Equipment Co., Inc.;* Carmen R. Goldings; Clelia S. Goldings; Ethan D. Goldings; Herbert J. Goldings, M.D.; Sarah M. Goldings; Doris Konig; Windell R. Carter; Catherine Carter; Mitchell W. Landy; and Rio Grande Savings & Loan Association,* individually and as representatives of a class of purchasers of Old Court certificates of deposit (*see* Amended Complaint in Maryland Federal District Court No. B-87-684, ¶ 1).

Respondents

B. Defendants in Nos. 88-3019 and 88-3020 below:

Jeffrey A. Levitt; LCP Corporation; Allan H. Pearlstein; Jerome S. Cardin; Light Street Partnership; Allen Feinberg; Robert D. Pearlstein; Samuel Shoubin; Dennis E. Guidice; Karol Levitt; Rosemary Pearlstein; Old Court Savings & Loan, Inc.; Maryland Savings-Share Insurance Corp.; Charles C. Hogg, II; Paul B. Trice, Jr.; George W. H. Pierson; Jerome F. Dolivka; Francis F. Anderson; Michael J. Dietz; Leonard Bass; John C. Donohue, Sr.; Henry R. Elsnic; John D. Faulkner, Jr.; James D. Laudeman; Terry L. Neifeld; Glass and Associates, P.A.; Cardin and Cardin, P.A.; Venable, Baetjer & Howard; and David Uhlfelder.

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* Pursuant to Supreme Court Rule 28.1, Petitioners state that neither Enterprise Equipment Co., Inc. nor Rio Grande Savings & Loan Association has any parent companies, subsidiaries or affiliates.

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals is reported at 865 F.2d 595. The opinion of the District Court was delivered from the bench and has not been reported in any known official or unofficial reporter. Attached in the Appendix hereto are copies of the Opinions, Orders and Judgments issued by the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 12, 1989.

This Court has jurisdiction to review the issues presented herein by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The verbatim text of the following statutory provisions is provided in the Appendix attached hereto:

The Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10).

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).

STATEMENT OF THE CASE AND BASIS OF FEDERAL JURISDICTION

The two consolidated actions below arise from the failure of Old Court Savings & Loan, Inc. ("Old Court") and the attendant collapse of the Maryland Savings-Share Insurance Corporation ("MSSIC"), a private corporation controlled by the Maryland savings and loan industry, the asserted purpose of which was to regulate that industry and to protect depositors and investors in Maryland savings and loan institutions, such as Old Court, which were not federally insured. As set forth in detail in the Amended Complaints, the failure of Old Court resulted directly from a massive fraud and other wrongful acts committed by the officers and directors of Old Court, the officers and directors of MSSIC, and the other defendants. (¶¶ 51-101.)[1]

Plaintiffs in the instant actions (Petitioners in this Court) purchased certificates of deposit from Old Court in reliance upon the purportedly insured status of the certificates and representations by Old Court and MSSIC that such investments were safe. (*See, e.g.*, ¶¶ 13-48.) However, unknown to plaintiffs, Old Court's principals were using Old Court to raise large amounts of capital to dispose of and invest for their own personal benefit, in part through the generation of cash by selling

1. Throughout this Petition paragraph references will be to the Amended Complaint in Civil Action No. B-87-684 in the Maryland District Court. (No. B-87-684 was designated as No. 86-0092 when the action was initially instituted in the United States District Court for the Eastern District of Pennsylvania, prior to its transfer to the United States District Court for the District of Maryland.) In No. B-87-684, the plaintiff class consists only of citizens of states other than Maryland, thereby vesting the District Court with diversity jurisdiction as well as federal question jurisdiction, since all defendants are Maryland citizens. The other action involved herein, No. B-87-668 (which was No. 86-0090 in the Eastern District of Pennsylvania) includes Maryland plaintiffs in addition to plaintiffs from other states. In all other respects, the actions are identical.

Old Court certificates of deposit both inside and outside the State of Maryland. (¶ 78.) The sale of Old Court certificates of deposit was promoted by a massive national advertising campaign orchestrated by Old Court's principals. (¶¶ 79-80.)

Additionally, the Old Court defendants and MSSIC together prepared and distributed numerous letters, brochures and other materials emphasizing the risk-free nature of investments and deposits at Old Court based upon the representation that they were fully insured up to $100,000 per account. (¶ 82.) The advertisements and other representations relied upon by plaintiffs and the public were intended to create, and did create, the false impression that Old Court certificates of deposit were safe investments, insured by a governmental agency similar to the Federal Deposit Insurance Corporation ("FDIC") and the Federal Savings and Loan Insurance Corporation ("FSLIC"). (¶ 83.)

However, while MSSIC was held out as a "regulator" of the Maryland savings and loan industry, it actually functioned as a captive agent of that industry and of Old Court in particular, participating in and covering up Old Court's fraud on the plaintiffs and other investors. (¶¶ 86-89.) MSSIC knew that Old Court certificates of deposit were not "safe" investments because, *inter alia,* several of Old Court's insiders were diverting substantial funds for their own use, Old Court was known by MSSIC to be a "habitual violator" of MSSIC's rules and regulations, and Old Court was making insider loans in amounts prohibited by MSSIC and state regulations. *Id.* Moreover, MSSIC falsely represented to the public that its "insurance" was sufficient to protect each of the accounts at all of its 101 member savings and loan institutions, when in fact MSSIC had insufficient liquid assets to back up the claimed insurance. (¶ 90.) Finally, MSSIC falsely implied that it was part of the government of Maryland and that it provided insurance comparable

to that supplied by the Federal Government through FSLIC and FDIC. (¶¶ 90, 94.)

The various defendants knowingly and intentionally conspired with each other to cover up the fact that Old Court was being run solely for the benefit of those associated with it and that, as a result, Old Court was on the brink of financial disaster and was, in fact, insolvent. (¶¶ 84-99.) Plaintiffs allege in detail the complete ineffectiveness of the Maryland regulatory and insurance schemes, which not only permitted but facilitated the depredations of Old Court's principals, including their fraudulent inducement of investors such as plaintiffs and their diversion of funds from Old Court into personal and business enterprises. (¶¶ 86-90, 96-98.)

Inevitably, a run on Old Court took place, and Old Court was unable to meet the demands for withdrawals by its customers. On May 13, 1985, Old Court was placed in conservatorship. Since approximately June 7, 1985, all withdrawals from all accounts at Old Court have been prohibited, with a few minor exceptions. On or about November 8, 1985, the Old Court conservatorship proceeding was converted into a receivership proceeding. (¶¶ 99-108.) The receiver, Maryland Deposit Insurance Fund ("MDIF"), stated that owners of Old Court certificates of deposit will not receive any interest on their certificates accruing after November 8, 1985, nor will they receive the difference between the 5½% interest rate which accrued on certificates that matured between May 13, 1985 and November 8, 1985 and the interest rate which such certificates bear. (¶ 114.)

Accordingly, in January, 1986, plaintiffs, individually and on behalf of two classes of purchasers of Old Court certificates of deposit, filed the instant actions in the United States District Court for the Eastern District of Pennsylvania, asserting claims under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78 *et seq.,* and the Racketeer Influenced and Corrupt

Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, as well as various pendent state law claims.

After the actions were filed in the Eastern District of Pennsylvania, all defendants responded with motions to dismiss and/or transfer the actions to the District of Maryland. The motions to dismiss were based principally upon arguments that plaintiffs had not stated a claim under the federal securities laws because the certificates of deposit purchased by plaintiffs are not securities; that plaintiffs had failed to allege properly the elements of their RICO claims; and that the District Court should abstain from adjudicating any of plaintiffs' claims. In response, plaintiffs argued that the certificates of deposit are securities, based primarily upon an analysis of the Securities Exchange Act of 1934 and this Court's decision in *Marine Bank v. Weaver,* 455 U.S. 551 (1982). Plaintiffs also argued, *inter alia,* that while abstention on any of plaintiffs' claims was inappropriate, the court should not in any event abstain with respect to plaintiffs' Exchange Act and RICO claims because jurisdiction over such claims is exclusively federal, and abstention is improper where a claim cognizable only in the federal courts is involved.

On February 17, 1987, the court in the Eastern District of Pennsylvania entered an Order transferring the cases to the District of Maryland; without resolving any other issues raised by defendants' motions. Following the submission of supplemental briefs, the parties presented argument to the court in the District of Maryland on December 4, 1987. The court ruled from the bench that same day, dismissing both cases.

The District Court first held that plaintiffs had failed to state a cause of action under the Exchange Act because it found that the Old Court certificates of deposit are not securities. The court then considered the abstention issues raised by defendants. As a threshold matter, the court determined that state courts have

concurrent jurisdiction over plaintiffs' RICO claims. Having decided that plaintiffs' RICO claims were cognizable in state court, the District Court felt that abstention was "a far more viable option," and proceeded to analyze the applicability of the abstention doctrines set forth in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), and *Younger v. Harris,* 401 U.S. 37 (1971). The District Court determined that it was appropriate to abstain under both *Burford* and *Colorado River,* and entered formal Orders dismissing both cases on December 8, 1987. (*See* Appendix.)

The Court of Appeals for the Fourth Circuit affirmed the District Court's Orders in an opinion rendered on January 12, 1989. The Fourth Circuit held that Old Court certificates of deposit are not securities under the Exchange Act based upon its reading of *Marine Bank.* The court also held, relying upon its recent decision in *Brandenburg v. Seidel,* 859 F.2d 1179 (4th Cir. 1988), that federal court jurisdiction over RICO is concurrent with the state courts, and that the District Court's decision to abstain and dismiss the instant actions was appropriate.

The basis for federal subject matter jurisdiction in the court of first instance is 28 U.S.C. § 1331 in both Case No. B-87-684 and Case No. B-87-668. Additionally, federal diversity jurisdiction is conferred by 28 U.S.C. § 1332 in Case No. B-87-684.

ARGUMENT

A. A Writ of Certiorari Should Be Granted To Determine Whether Certificates Of Deposit Such As Those Issued By Old Court Are "Securities" Under The Federal Securities Laws

1. The Holding Of The Court Below Is Inconsistent With A Prior Decision Of This Court

In *Marine Bank v. Weaver*, 455 U.S. 551 (1982), this Court held that a certificate of deposit issued by a federally regulated and insured bank was not a "security" for purposes of the federal securities laws. In so holding, the Court followed the traditional analytical method of determining first whether an instrument falls within the definition of "security" in the federal securities laws and, if it does, then determining whether the factual context in which the instrument was issued requires that it *not* be treated as a security.

In *Marine Bank*, the Court examined the underlying factual context and found that the comprehensive scheme of federal banking regulation applicable in that case "virtually guaranteed payment in full" to depositors in federally regulated and insured banks. *Id.* at 558. The Court reasoned that because of this "virtual guarantee," holders of certificates of deposit issued by federally regulated and insured banks were "abundantly protected" by the federal banking regulations, and it was therefore "unnecessary" in light of this protection to subject the issuers of such certificates to liability under the federal securities laws. *Id.* at 559.

Thus, the holding in *Marine Bank* was premised upon both the existence *and* the effectiveness of the federal banking regulations at issue. *See Marine Bank*, 455 U.S. at 558-59 and n.7. Specifically, in determining whether a certificate of deposit or other instrument is a security, *Marine Bank* requires an analysis of the factual context in which the instrument was issued, including

the applicability and efficacy of any regulatory system, to determine whether purchasers of such instruments are so "abundantly protected" that the protection of the federal securities laws becomes unnecessary. Thus:

> [e]ach transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the *factual setting as whole*.

Id. at 560 n.11 (emphasis added).

Under the rationale of *Marine Bank*, the certificates of deposit purchased by plaintiffs are securities. This Court has consistently held that the definition of the term "security" in the Exchange Act, 15 U.S.C. § 78c(a)(10), is to be liberally construed to include instruments which are not expressly identified by the language, as well as those which are explicitly included. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 (1985); *Marine Bank*, 455 U.S. at 556; *Teamsters v. Daniel*, 439 U.S. 551, 558 (1979). In examining the nature of certificates of deposit, it is apparent that they are instruments which are the functional equivalent of "notes", "bonds", "debentures", or the "evidence of indebtedness" specified in the statutory definition. Like those instruments, their essential characteristic is that they represent a transaction in which the use of money is obtained in exchange for a promise to pay a fixed sum plus interest on some future date. As Judge Posner has noted:

> a certificate of deposit is a type of promissory note — and "note" of course is one of the instruments specifically listed in section 3(a)(10) [of the Exchange Act] — and it is also what is "commonly known as a security."

Sutter v. Groen, 687 F.2d 197, 200 (7th Cir. 1982)

(quoting section 3(a)(10) of the Exchange Act). Accordingly, certificates of deposit are presumptively securities under the federal securities laws, as this Court recognized in *Marine Bank*. *See Marine Bank*, 455 U.S. at 556-57.

The second phase of the inquiry is based upon the requirement in the Exchange Act that the statutory definition is to be applied "unless the context otherwise requires." 15 U.S.C. § 78c(a). Thus, the relevant issue is whether the Old Court certificates of deposit, which fall within the definition of "security" in the first instance, must be removed from the scope of the definition in light of the context in which they were issued.

In the instant actions, plaintiffs allege that the Maryland regulatory and insurance schemes which purportedly protected depositors and investors were completely ineffective and that, in addition, the entities charged with regulating the Maryland savings and loan industry were nothing more than accomplices in Old Court's fraud, which resulted in the massive losses alleged by plaintiffs. Therefore, the factual context in which the Old Court certificates of deposit were issued was entirely different from that in *Marine Bank*, and wholly insufficient under *Marine Bank* to remove the certificates from the coverage of the federal securities laws. Unlike in *Marine Bank*, there was no effective regulatory scheme in Maryland which "virtually guaranteed" repayment and thereby "abundantly protected" purchasers of Old Court certificates of deposit.

The Fourth Circuit's fundamental approach to determining whether the Old Court certificates of deposit are securities was inconsistent with the analysis required by *Marine Bank*. Initially, the court below agreed that, under the statutory definition of "security" in the Exchange Act, it "might well conclude" that the Old Court certificates of deposit purchased by the plaintiffs are securities entitled to the protection afforded by the Exchange Act. 865 F.2d at 598. The court also noted

that, under *Marine Bank*, a certificate of deposit may be removed from the definition of "security" under the Exchange Act if there is in place a "comprehensive regulatory and insurance system." *Id.* at 598-99.

The Fourth Circuit erred, however, when it failed to recognize this Court's concern evidenced in *Marine Bank* that the system of regulation must not simply exist on paper, but must also be *effective* in protecting the holders of certificates of deposit before the certificates can be removed from the ambit of the securities laws. *See Marine Bank*, 455 U.S. at 558-59 and n.7. Instead, the Fourth Circuit utilized an approach which was fundamentally at odds with the factual context analysis required by *Marine Bank*, and which ignored this Court's directive that the "factual setting as a whole" must be analyzed in determining whether a particular certificate of deposit or other instrument is a security. *See id.* at 560 n.11. Thus, while it recognized that the Maryland regulatory system was "ineffective," the court below dismissed that critical fact, without analyzing whether Old Court certificate of deposit holders were "abundantly protected" by such an ineffective regulatory scheme, with the summary statement that:

> we do not think that *Marine Bank* depends upon the effectiveness of the regulatory scheme as it may have been administered.

865 F.2d at 599.[2]

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2. The court also opined that when the Old Court certificates of deposit underlying these actions were issued, "there had been no break down in Maryland's then regulatory scheme, and neither Old Court nor MSSIC was insolvent." 865 F.2d at 599. However, as alleged in the Amended Complaints, Maryland's "regulatory scheme" was wholly ineffective, and Old Court, which issued certificates of deposit until virtually the day it collapsed (*see, e.g.*, ¶¶ 31, 100), was in fact insolvent during at least part of the time in which the certificates of deposit were issued. (¶¶ 84-99). At a minimum, this presents a factual question which precludes dismissal of the case under Fed. R. Civ. P. 12(b)(6), but which was ignored under

This approach led the Fourth Circuit to the erroneous conclusion that the mere existence of statutes, rules and regulations concerning the Maryland savings and loan industry at the time plaintiffs were fraudulently induced to purchase Old Court certificates of deposit was sufficient to remove those instruments from the reach of the federal securities laws, a conclusion wholly inconsistent with the rationale and holding of *Marine Bank.*

Moreover, the Fourth Circuit found it "significant" that the result in *Marine Bank* itself "did not depend upon the *complete* effectiveness of the federal scheme," because some federally chartered or insured institutions fail, and because Congress only recently placed the full faith and credit of the United States behind federal insuring agencies. 865 F.2d at 599 (emphasis added). The issue under *Marine Bank,* however, is not whether a regulatory system is absolutely infallible, but whether the system is *sufficiently* effective so that depositors are "virtually guaranteed payment in full." *Marine Bank,* 455 U.S. at 558. Viewing the "factual setting as a whole," this Court in *Marine Bank* found that such a degree of effectiveness existed, because the investors were "abundantly protected" by the federal banking laws. In the setting in which plaintiffs purchased their certificates of deposit, however, the system was completely ineffective, and plaintiffs were unprotected by Maryland's regulatory system. The lower court's failure to undertake any analysis of this factual setting was improper under *Marine Bank,* and led directly to the court's erroneous conclusion.

Moreover, even under the Fourth Circuit's approach to this issue, it reached an incorrect result, since plaintiffs allege a system operating at the polar opposite of a

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NOTES *(Continued)*
the Fourth Circuit's flawed ... oach to the *Marine Bank* analysis.

"completely effective" system. The statutes and regulations in Maryland were completely *ineffective,* both inherently and as a result of their "administration" by entities controlled by the Maryland savings and loan industry.[3]

In light of the Fourth Circuit's fundamental misapplication of the analysis required by *Marine Bank,* Petitioners seek a Writ of Certiorari under Supreme Court Rule 17.1(c) to resolve this important question of federal law regarding the reach of the federal securities laws to protect purchasers of financial instruments which are not covered, or which are ineffectively covered, by state regulatory and insurance systems.

2. The Fourth Circuit's Application of *Marine Bank* Conflicts With The Analyses Of Other Federal Courts Of Appeals

The rationale and analysis of the Fourth Circuit in this case are inconsistent not only with *Marine Bank* itself, but also with the analysis of *Marine Bank* employed by other federal Courts of Appeals.

In *West v. Multibanco Comermex, S.A.,* 807 F.2d 820 (9th Cir.), *cert. denied,* 482 U.S. 906 (1987), a case dealing with Mexican bank certificates of deposit which lost much of their value because of the devaluation of the peso in the early 1980s, the court noted that there had been no bank failure in Mexico for over fifty years, a fact which indicated that Mexican banking regulations were the equivalent of American federal banking regulations in scope and effect. *Id.* at 827 (citing *Wolf v.*

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3. The Maryland legislature evidenced its recognition of the ineffectiveness of the system in place when plaintiffs purchased their certificates of deposit by completely overhauling Maryland's statutory scheme after the collapse of Old Court and MSSIC, beginning with a special session of the legislature in May, 1985, within weeks of Old Court's demise. *Compare* Md. Fin. Inst. Code Ann. Titles 8, 9 and 10 (1986 and Supp. 1988) *with* Md. Fin. Inst. Code Ann. Titles 8, 9 and 10 (1980).

Banco Nacional de Mexico, S.A., 739 F.2d 1458, 1462 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985)).[4] The plaintiffs in *West* argued that, while on paper the Mexican system appeared to provide protection, in reality the Mexican officials neither complied with nor enforced their own laws, and therefore the supposed regulatory protection did not in fact exist. 807 F.2d at 827.

The Ninth Circuit, applying the rationale of *Marine Bank* in light of its prior holding in *Wolf*, emphasized that a "trial court must hear evidence on the degree of protection that [the regulatory] structure offers a depositor against insolvency." 807 F.2d at 828 (quoting *Wolf*, 739 F.2d at 1463). In this context, the *West* court indicated that the actual *operation* of the regulatory system would be a relevant inquiry for the trial court. *Id.* at 828-29 and n.7.[5] The court below, however, reached its holding without considering – and, indeed, affirmatively rejecting any obligation to consider – the degree of protection offered by or the actual operation of the Maryland regulatory system.

Additionally, in *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230 (2d Cir. 1985), the Court of Appeals for the Second Circuit correctly recognized that:

4. In *Wolf*, the plaintiff conceded that the absence of any Mexican bank failure for over fifty years indicated the equivalence of the protection afforded by Mexican and American banking regulations. 739 F.2d at 1463. Accordingly, since there was as a matter of stipulated fact a comprehensive and effective regulatory system in place in Mexico, the certificates of deposit in *Wolf* could not be held to be securities under *Marine Bank*. *Id.* at 1463-64.

5. The court added that "a showing can be made either that the structure may not address the depositor's problems or that even with the regulatory system, banks nonetheless fail with some regularity." *Id.* at 828-29 n.7. The court, however, determined that it was unable to inquire into the alleged wrongdoing of Mexican officials in the case before it because of the "act of state" doctrine. *Id.* at 828-29 and n.7.

> [t]he crux of the *Marine Bank* decision is that federal banking regulations and federal deposit insurance *eliminate the risk of loss to the investor*, thereby obviating the need for the protection of the federal securities laws.

Id. at 240 (emphasis added).

Following the rationale of *Marine Bank*, the Second Circuit held, *inter alia*, that certificates of deposit are not exempt from the federal securities laws where the purchasers are not otherwise "abundantly protected". *Id.* at 241.

Petitioners request this Court to issue a Writ of Certiorari to resolve this conflict in the Courts of Appeals regarding their application of the *Marine Bank* analysis. *See* Supreme Court Rule 17.1(a).

B. This Court Should Review The Lower Court's Holding That Federal And State Court Jurisdiction Over Civil RICO Claims Is Concurrent

In the District Court, defendants contended in support of their motions to dismiss the Amended Complaints that the court should abstain from hearing plaintiffs' claims, primarily because of the existence of pending state court actions relating to the Maryland savings and loan crisis. Plaintiffs, in response, argued that abstention was improper because, *inter alia*, their RICO claims could not be asserted in the state court actions to which defendants referred, since federal courts have exclusive jurisdiction over RICO claims.[6]

6. This Court has held that abstention is improper under *Colorado River* when plaintiffs have alleged claims for which jurisdiction resides exclusively in the federal courts. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 559-560 (1983). Moreover, numerous federal Courts of Appeals have held that abstention under one or more of the abstention doctrines elucidated by this Court is improper when claims are subject to exclusive federal jurisdiction. *See Finkielstain v. Seidel*, 857 F.2d 893, 896

Consequently, the District Court felt it necessary to determine whether jurisdiction over RICO claims is exclusively federal before it reached the merits of the abstention argument. The court found that jurisdiction over RICO claims is concurrent and, after considering the abstention issues, decided to abstain under *Colorado River* and *Burford*. The Court of Appeals for the Fourth Circuit affirmed the District Court's holding that jurisdiction over RICO claims is concurrent, then affirmed the District Court's decision to abstain under *Burford* only, based upon its prior decision in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988).[7]

Thus, the RICO jurisdiction issue is critical to the determination of the abstention issue in the actions below and in similar cases throughout the federal court system. Moreover, the exclusivity or non-exclusivity of federal court jurisdiction over RICO claims is an important question of federal law which has not yet been, but should be, settled by this Court. Finally, the federal

NOTES *(Continued)*

(2d Cir. 1988); *General Motors Corp. v. California State Bd. of Equalization*, 815 F.2d 1305, 1309 (9th Cir. 1987) (Kennedy, J.), *cert. denied*, 108 S. Ct. 1122 (1988); *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59, 62-63 (2d Cir. 1986); *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *United States v. Adair*, 723 F.2d 1394, 1402 n.5 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Cotler v. Inter-County Orthopaedic Ass'n*, 526 F.2d 537, 542 (3d Cir. 1975). *See also Kruse v. Snowshoe Co.*, 715 F.2d 120, 124 (4th Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984); *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Ins. Co.*, 600 F.2d 671, 676 (7th Cir. 1979). *But see Kartell v. Blue Shield of Massachusetts, Inc.*, 592 F.2d 1191 (1st Cir. 1979).

7. *Brandenburg* was also based upon the failure of a non-federally-regulated state savings and loan association in Maryland. In *Brandenburg*, however, no federal securities law claim was asserted. Moreover, the allegations upon which plaintiffs' RICO claims in the instant actions are based differ significantly from the *Brandenburg* plaintiffs' claims.

Courts of Appeals are in conflict with each other on this issue, and also with numerous state appellate courts. Accordingly, Petitioners request this Court to grant a Writ of Certiorari pursuant to Supreme Court Rules 17.1(a) and 17.1(c).

1. The Question Whether Jurisdiction Over Civil RICO Claims Lies Exclusively With The Federal Courts Or Is Concurrent With State Courts Has Been The Subject Of Conflicting Decisions In The Federal Courts Of Appeals And Between Federal Courts Of Appeals And State Appellate Courts

a. The Conflict Among The Federal Courts Of Appeals

Three Federal Courts of Appeals have explicitly decided whether federal courts have exclusive jurisdiction over civil RICO claims or whether they share concurrent jurisdiction with the state courts. The Sixth Circuit has held that such jurisdiction lies exclusively with the federal courts, while the Fourth and Ninth Circuits have held that jurisdiction over RICO claims is concurrent.[8]

8. The Seventh Circuit has indicated in *dictum* that it is leaning toward finding concurrent jurisdiction. *See County of Cook v. MidCon Corp.*, 773 F.2d 892, 905 n.4 (7th Cir. 1985). *But see Washington Courte Condominium Association v. Washington Golf Corp.*, 150 Ill. App.3d 681, 501 N.E.2d 1290 (1986) (RICO jurisdiction exclusively federal); *Thrall Car Mfg. Co. v. Lindquist*, 145 Ill. App.3d 712, 495 N.E.2d 1132 (1986) (same).

Additionally, the Court of Appeals for the Fifth Circuit, in *Dubroff v. Dubroff*, 833 F.2d 557 (5th Cir. 1987), stated that, in its view, Texas courts would ultimately be likely to assume concurrent jurisdiction. *But see Main Rusk Associates v. Interior Space Constructors, Inc.*, 699 S.W.2d 305 (Tex. Ct. App. 1985) (RICO jurisdiction exclusively federal). *See also Hampton v. Long*, 686 F. Supp. 1202 (E.D. Tex. 1988) (refused to find concurrent jurisdiction in light of *Main Rusk*).

The Sixth Circuit

In *Chivas Products, Ltd. v. Owen,* 864 F.2d 1280 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit found that jurisdiction over RICO claims is the exclusive province of the federal courts. In a detailed analysis, the court recognized that, while concurrent jurisdiction over civil causes of action created by federal statute is normally presumed under the rule of *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473 (1981), this presumption may be rebutted in a number of ways:

> Congress may confine jurisdiction of a federal claim to the federal courts either explicitly or implicitly "[1] by an explicit statutory directive, [2] by unmistakable implication from legislative history, or [3] by a clear incompatibility between state-court jurisdiction and federal interests."

Chivas, 864 F.2d at 1282 (quoting *Gulf Offshore,* 453 U.S. at 479).

Since Congress did not explicitly confer exclusive jurisdiction upon the federal courts in the RICO statute, the Sixth Circuit found the first of the three *Gulf Offshore* exceptions inapplicable. The court, however, held that a number of factors supported the conclusion that RICO jurisdiction is exclusive based upon the second and third *Gulf Offshore* exceptions.

First, the court found "considerable evidence in the legislative history" in support of exclusive jurisdiction, and stated that the sponsors of RICO "should be held to have intended an exclusively federal forum for civil RICO." 864 F.2d at 1283. The court based its conclusion primarily upon the undisputed fact that the drafters of the RICO statute "consciously borrowed the exact language of the Clayton Act in drafting the jurisdiction and venue sections for civil RICO." *Id.* (citations omitted). Since the language creating civil causes of action in RICO, 18 U.S.C. § 1964(c), is virtually identical to the corresponding language in the Clayton Act, 15 U.S.C.

§ 15(a), and jurisdiction over Clayton Act claims resides exclusively in the federal courts, the Sixth Circuit found this conscious parallel between RICO and the Clayton Act to be significant in determining that RICO jurisdiction is exclusively federal. *Id.* at 1284 (quoting *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143, 107 S. Ct. 2759, 2764-65 (1987); *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 489 (1985)).

Additionally, the Sixth Circuit held that the *Gulf Offshore* presumption of concurrent jurisdiction was rebutted by the "clear incompatibility between state-court jurisdiction and federal interests" reflected in RICO's statutory scheme. The court first noted that the civil remedy provided by section 1964(c) was "designed as an integral part of a broad-front attack on organized crime." 864 F.2d at 1284. Analyzing the statutory scheme as a whole, the court concluded that "features of the RICO structure are incompatible with concurrent state-court jurisdiction," since almost all of the RICO "predicate offenses" defined in section 1961(1) to constitute "racketeering activity" may be prosecuted only in the federal courts. *Id.* at 1285. The court explained that state courts have no jurisdiction to interpret or apply, and are generally unfamiliar with, the federal mail fraud, wire fraud and securities fraud offenses which constitute the predicate acts in the "great preponderance" of civil RICO cases. *Id.*

The Sixth Circuit also reasoned that the procedural provisions contained in RICO, which in some circumstances are applicable only to RICO actions brought in federal court, are inconsistent with any workable application of concurrent state court jurisdiction. *Id.* at 1285-86 (citing 18 U.S.C. §§ 1965-68.) Equally significantly, the Sixth Circuit noted that:

> [s]tate court jurisdiction over the complex and ambiguous RICO statute would create the possibility of

> conflicting interpretations not only in the 12 regional federal courts of appeals but also in 50 states.

Id. at 1285.

The Ninth Circuit

In *Lou v. Belzberg,* 834 F.2d 730 (9th Cir. 1987), *cert. denied,* 108 S. Ct. 1302 (1988) the Court of Appeals for the Ninth Circuit reached a contrary conclusion with respect to whether the *Gulf Offshore* presumption had been rebutted.[9] The Ninth Circuit found no "unmistakable implication" in RICO's legislative history that Congress intended jurisdiction to be exclusive. Moreover, the court rejected arguments that exclusive jurisdiction should be implied because of the conscious modelling of RICO upon section 4 of the Clayton Act, 15 U.S.C. § 15, finding that:

> Congress' mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language.

Id. at 737.

Thus, the court was "not convinced" that the similarity between RICO and the Clayton Act supported an inference that RICO jurisdiction should also be exclusive. *Id.* [10] The court added that Congress' mandate for a liberal construction of RICO would be "hindered" if state courts were not permitted to hear RICO claims

9. *Lou* was decided in November, 1987, and represented the first decision by a federal Court of Appeals on the RICO exclusive jurisdiction issue. In *Chivas,* decided thirteen months later in December, 1988, the Sixth Circuit declined to follow either the rationale or the holding of *Lou.*

10. *Lou* was decided prior to this Court's decision in *Agency Holding Corp., supra,* in which the Court imported the Clayton Act's four-year statute of limitations into civil RICO because of the "clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act." 107 S. Ct. at 2765.

since, under such circumstances, potential plaintiffs could "not assert RICO claims that otherwise would have been joined with state law claims in state court." *Id.*

Moreover, the Ninth Circuit stated that there was no "clear incompatibility" between concurrent state court jurisdiction and federal interests under RICO because, *inter alia,* "RICO is not tied solely to federal laws," noting that certain state criminal violations may also constitute RICO predicate acts. *Id.* at 737-38. Additionally, because the court considered government enforcement actions and private civil damages actions under RICO to be "entirely distinct", it found "no reason to read the federalized aspects of the statute into" RICO's civil remedies provision. *Id.* at 738.

The Fourth Circuit

In *Brandenburg v. Seidel,* 859 F.2d 1179 (4th Cir. 1988), the case upon which the court below based its holding that jurisdiction over civil RICO claims is not exclusively federal, the Fourth Circuit followed reasoning similar to that utilized by the Ninth Circuit in *Lou v. Belzberg.*[11] The court held that the *Gulf Offshore* presumption was not rebutted, since it found no "unmistakable implication" of a congressional intent to provide for exclusively federal jurisdiction, nor any "clear incompatibility" between state court jurisdiction and federal interests. *Id.* at 1193-94.[12]

11. In both *Brandenberg* and the instant case, however, the Fourth Circuit failed to address this Court's analysis in *Agency Holding Corp.* of the similarity between RICO and the Clayton Act.

12. Lower federal courts in other circuits have reached similarly inconsistent results. *Compare Cacioppe v. Superior Holsteins III, Ltd.,* 650 F. Supp. 607 (S.D. Tex. 1986); *Spence v. Flynt,* 647 F. Supp. 1266 (D. Wyo. 1986); *Massey v. City of Oklahoma City,* 643 F. Supp. 81 (W.D. Okla. 1986); *Broadway v. San Antonio Shoe, Inc.,* 643 F. Supp. 584 (S.D. Tex. 1986); *Nordberg v. Lord, Day & Lord,* 107 F.R.D. 692 (S.D.N.Y. 1985); *Ideal Stencil Machine &*

Accordingly, Petitioners request that this Court issue a Writ of Certiorari to resolve the conflict between the federal Courts of Appeals on this issue. *See* Supreme Court Rule 17.1(a).

b. The Decisions Of State Appellate Courts Are Also In Conflict With The Decisions Of The Federal Courts Of Appeals

In addition to the conflicting decisions emanating from the federal Court of Appeals, a number of state courts of last resort and state intermediate appellate courts have also reached results that are inconsistent with each other and with the decisions of the federal Courts of Appeals.

Three state courts of last resort have expressly held that jurisdiction over RICO claims is concurrent. *See Cianci v. Superior Court,* 40 Cal.3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985); *Simpson Electric Corp. v. Leucadia, Inc.,* 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988); *Rice v. Janovich,* 109 Wash.2d 48, 742 P.2d 1230 (1987). Although no state court of last resort has explicitly held RICO jurisdiction to be exclusively federal, in *VanderWeyst v. First State Bank of Benson,* 425 N.W.2d 803 (Minn.), *cert. denied,* 109 S. Ct. 369 (1988), the Supreme Court of Minnesota

NOTES *(Continued)*

Tape Co. v. Merchiori, 600 F. Supp. 185 (S.D. Ill. 1985) (all finding exclusive federal court jurisdiction under RICO) *with Kim v. Pereira Enterprises, Inc.,* 694 F. Supp. 200 (E.D. La. 1988); *Village Improvement Ass'n v. Dow Chemical Co.,* 655 F. Supp. 311 (E.D. Pa. 1987); *Karel v. Kroner,* 635 F. Supp. 725 (N.D. Ill. 1986); *Chas. Kurz Co. v. Lombardi,* 595 F. Supp. 373 (E.D. Pa. 1984); *Luebke v. Marine National Bank,* 567 F. Supp. 1460 (E.D. Wis. 1983) (all finding concurrent jurisdiction). *See also Printing Mart-Morristown, Inc. v. Rosenthal,* 650 F. Supp. 1444 (D.N.J.) (refusing to decide jurisdictional issue but dismissing case on ground that plaintiff should have raised its RICO claims in prior state court action to avoid effect of New Jersey "claim preclusion" doctrine), *app. dism'd,* 833 F.2d 306 (3d Cir. 1987).

stated that it had "serious reservations" about assuming concurrent RICO jurisdiction. *Id.* at 812. Moreover, numerous state intermediate appellate courts have also decided this issue, with inconsistent results.[13]

Accordingly, this Court should review the decision of the court below to resolve the conflicts between and among the federal and state courts on this issue. *See* Supreme Court Rules 17.1(a), 17.1(c).

2. The Issue Whether RICO Jurisdiction Is Concurrent Or Exclusive Is An Important Question Of Federal Law Which Should Be Decided By This Court

As explained above, numerous federal and state courts have rendered decisions upon the exclusivity of federal court jurisdiction under RICO. These decisions comprise an irregular patchwork of decisional law that is wholly inconsistent with the purpose of RICO to provide a uniform and coherent statutory scheme to effectuate the federal interest in attacking and eradicating organized criminal activity. The widespread use of the civil RICO damages remedy requires more consistency and predictability in this vital area of the law.

Moreover, the current unsettled status of the RICO jurisdiction issue may have serious adverse consequences for litigants, some of which are graphically illustrated by the facts of the instant actions. The Court

13. *Compare Levinson v. American Accident Reinsurance Group,* 503 A.2d 632 (Del. Ch. 1985); *Thrall Car Mfg. Co. v. Lindquist,* 145 Ill. App.3d 712, 495 N.E.2d 1132 (1986); *Maplewood Bank & Trust Co. v. Acorn, Inc.,* 207 N.J. Super. 590, 504 A.2d 819 (1985); *Vickers v. Niesz,* No. 88-CA-28 (Ohio App. February 17, 1989); *Greenstein, Logan & Co. v. Burgess Marketing, Inc.,* 744 S.W.2d 170 (Tex. Ct. App. 1987); *Main Rusk Associates v. Interior Space Constructors, Inc.,* 699 S.W.2d 305 (Tex. Ct. App. 1985) (all finding exclusive federal jurisdiction) *with Hoke v. E. F. Hutton & Co.,* 91 N.C. App. 159, 370 S.E.2d 857 (1988); *Village at Camelback Property Owners Ass'n v. Carr,* 371 Pa. Super. 452, 538 A.2d 528, *appeal granted,* 548 A.2d 257 (Pa. 1988) (finding concurrent jurisdiction).

of Appeals for the Fourth Circuit, after deciding that RICO jurisdiction is concurrent and that plaintiffs could bring their claims in Maryland state court, affirmed the District Court's decision to abstain, in which the District Court *dismissed* – not merely stayed – plaintiffs' federal actions. The Maryland Court of Appeals, however, has never addressed the RICO jurisdiction issue. If that court subsequently determines that RICO jurisdiction is exclusive, plaintiffs such as Petitioners will be left with no forum in which to vindicate the rights created by Congress in this federal remedial statute.[14]

Such situations are even more likely to occur in the Fifth and Seventh Circuits, where state courts have already taken positions on the issue. The Seventh Circuit indicated in *County of Cook, supra,* that it might find RICO jurisdiction to be concurrent, but state courts in that Circuit have explicitly held that jurisdiction is exclusive.[15] Additionally, the Court of Appeals for the Fifth Circuit held in *Dubroff, supra,* that Texas courts would ultimately be likely to assume concurrent jurisdiction, despite a prior holding of a Texas intermediate appellate court that RICO jurisdiction is exclusive. *See Main Rusk, supra.* Moreover, a federal District Court in Texas expressly refused to find concurrent jurisdiction because of the contrary state court holding in *Main Rusk.*[16]

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14. At oral argument in the Fourth Circuit, counsel for defendants agreed that should this Court determine that RICO jurisdiction is exclusively federal, plaintiffs may reassert their RICO claims in federal court and the defendants will not raise any statute of limitations defense. Plaintiffs in other cases who have not obtained similar stipulations, however, may well lose their substantive rights under RICO if the statute of limitations expires prior to the dismissal of a RICO action by a court which determines that the action should have been brought in a different forum.

15. *See supra* note 8.

16. *See supra* note 8.

Finally, virtually all of the reported decisions on this issue have dealt with the same concerns – the application of *Gulf Offshore,* RICO's legislative history and similarity to the Clayton Act, the degree of compatibility between concurrent state court jurisdiction and the federal interests reflected in RICO, and the need for uniform interpretation and application of this far-reaching statute. Thus, the courts agree upon the factors that are determinative of this issue. The problem, however, is that in the absence of clear guidance by this Court, the lower federal courts and the state courts will continue to reach unpredictable and conflicting results based upon varying applications of the *Gulf Offshore* analysis. Therefore, a definitive ruling by this Court would clarify the current confusion surrounding this issue and restore order to the jumbled world of RICO jurisdictional jurisprudence. *See* Supreme Court Rule 17.1(c).

CONCLUSION

The lower court's misapplication of this Court's holding in *Marine Bank v. Weaver* is inconsistent with the analytic principles set forth in *Marine Bank* and with decisions of other federal Courts of Appeals analyzing *Marine Bank,* and presents an important federal question relating to the protection afforded to purchasers of financial instruments from institutions which are effectively unregulated and uninsured. Additionally, the issue whether jurisdiction over civil RICO claims is exclusively federal is an important federal question which is the subject of widely disparate and conflicting rulings throughout the federal and state court systems, and requires a definitive resolution by this Court.

Accordingly, Petitioners respectfully request this Court to issue a Writ of Certiorari to the Court of Appeals for the Fourth Circuit to review the questions presented herein.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3019L

FRANCINE TAFFLIN; SEYMOUR ZUCKERMAN; ERIS ZUCKERMAN; RENALEE SELVIN; JOAN ZUCKERMAN; SEYMOUR ZUCKERMAN, Executor of the Estate of Samuel Zuckerman; GEORGE R. LYON; GEORGE C. LYON; PETER M. LYON; BRUCE K. LYON; ELIZABETH A. LYON; GEORGE R. LYON; MARY G. LATHROP, Personal Representatives of the Estate of GEORGE M. LYON; KENT H. BUTCHER; STANLEY Z. FELSENBERG, M.D., Personal Representative of the Estate of Minnie Felsenberg; MARGARET GRAVES; THURMAN L. GRAVES; SANDRA L. PLETKA; GERTRUDE DURSO; ENTERPRISE EQUIPMENT CO., INC.; CARMEN R. GOLDINGS; CLELIA S. GOLDINGS; ETHAN D. GOLDINGS; HERBERT J. GOLDINGS, MD; SARAH M. GOLDINGS; DORIS KONIG; WINDELL R. CARTER; CATHERINE CARTER; MITCHELL W. LANDY, RIO GRANDE SAVINGS & LOAN ASSOC.,

Plaintiffs-Appellants

versus

JEFFREY A. LEVITT; LCP CORPORATION; ALLAN H. PEARLSTEIN; JEROME S. CARDIN; LIGHT STREET PARTNERSHIP; ALLEN FEINBERG; ROBERT D. PEARLSTEIN; SAMUEL SHOUBIN; DENNIS E. GUIDICE; KAROL LEVITT; ROSEMARY PEARLSTEIN; OLD COURT SAVINGS & LOAN, INC.; MARYLAND SAVINGS SHARE INSURANCE CORP.; MARYLAND DEPOSIT INSURANCE FUND CORPORATION; CHARLES C. HOGG, II; PAUL B. TRICE, JR.; GEORGE W. PIERSON, H.; JEROME F. DOLIVKA; FRANCIS F. ANDERSON; MICHAEL J, DIETZ; LEONARD BASS; JOHN C. DONOHUE, SR.; HENRY R. ELSNIC; JOHN D. FAULKNER, JR.; JAMES D. LAUDEMAN; TERRY L. NEIFELD; GLASS AND ASSOCIATES, P.A.; CARDIN AND CARDIN, P.A., VENABLE, BAETJER & HOWARD; DAVID UNFELDER,

Defendants-Appellees

LCP CORPORATION,

Defendant

No. 88-3020

FRANCINE TAFFLIN; SEYMOUR ZUCKERMAN; ERIS ZUCKERMAN; RENALEE SELVIN; JOAN ZUCKERMAN; SYLVIA ZUCKERMAN; SEYMOUR ZUCKERMAN, Executor of the Estate of Samuel Zuckerman; GEORGE R. LYON; GEORGE C. LYON; PETER M. LYON; BRUCE K. LYON; ELIZABETH A. LYON; GEORGE R. LYON; MARY G. LATHROP, Personal Representatives of the Estate of George M. Lyon; GERTRUDE DURSO; ENTERPRISE EQUIPMENT CO., INC.; CARMEN R. GOLDINGS; CLELIA S. GOLDINGS; ETHAN D. GOLDINGS; HERBERT J. GOLDINGS, MD; SARAH M. GOLDINGS; DORIS KONIG; WINDELL R. CARTER; CATHERINE CARTER; MITCHELL W. LANDY, RIO GRANDE SAVINGS & LOAN ASSOC.,

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LCP CORPORATION,

Defendant

Appeals from the United States District Court of Maryland, at Baltimore. Walter E. Black, Jr. District Judge. (CA-87-668; CA-87-684)

Argued: November 2, 1988 Decided: January 12, 1989

Before: WINTER, *Chief Judge,* and WIDENER and CHAPMAN, *Circuit Judges.*

M. Norman Goldberger (Brian P. Flaherty, Gary L. Leshko, WOLF, BLOCK, SCHORR AND SOLIS-COHEN; Lawrence I. Weisman on brief) for Appellants. David B. Isbell (Charles F. C. Ruff, Carol Fortine, COVINGTON & BURLINGTON on brief), Andrew H. Marks (Luther Zeigler, Elaine A. Panagakos, CROWELL & MORING; Ralph S. Tyler, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL; James P. Ulwick, KRAMON & GRAHAM; Paul D. Krause, Carol Ann Petren, Jayson L. Spiegel, JORDAN, COYNE, SAVITS & LOPATA; Aubrey M. Daniel, III, WILLIAMS & CONNOLLY; Robert W. Hesselbacher, Jr., LAXALT, WASHINGTON, PERITO & DUBUC; John H. Zink, III, COOK, HOWARD, DOWNES & TRACY; Ronald Shur, ANDERSON, BAKER, KILL & OLICK; Howard B. Possick, ARENT, FOX, KINTNER, PLOTKIN & KAHN; Jay I. Morstein, FRANK, BERNSTEIN, CONWAY & GOLDMAN; James A. Rothschild, ANDERSON, COE & KING; Daniel F. Goldstein, BROWN & GOLDSTEIN; Andrew Radding, BLADES & ROSENFELD, P.A.; Francis S. Brocato, BROCATO & KEELTY; Stephen C. Winter, WINTER & ASSOCIATES; Ronald W. Fuchs, ECCLESTON & SEIDLER; Harold H. Burns; Thomas G. Brodie, POWER & MOSNER on brief) for Appellees.

WINTER, *Chief Judge:*

These consolidated cases arise out of the failure of Old Court Savings & Loan, Inc. (Old Court), a state chartered savings and loan association, and the collapse of the Maryland Savings-Share Insurance Corporation

(MSSIC), a state-chartered non-profit corporation created to insure the accounts in Maryland savings and loan associations that did not have federal deposit insurance.

Plaintiffs, all non-residents of Maryland, are purchasers and holders of certificates of deposit of Old Court which, together with the interest thereon, are unpaid. Defendants are (a) the former officers and directors of Old Court, (b) the former officers and directors of MSSIC, (c) the law firm of Venable, Baetjer & Howard, counsel to MSSIC and Old Court, (d) Old Court's accounting firm, and (e) State of Maryland Deposit Insurance Fund Corporation (MDIF), the state-created successor to MSSIC.[1] Plaintiffs allege causes of action arising under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as state law claims.

The district court granted defendants' motions to dismiss on the grounds that plaintiffs had failed to allege a claim under the Securities Exchange Act of 1934 and that the district court should abstain from deciding the other alleged causes of action since they were all raised in pending litigation in the Circuit Court for Baltimore City.

Plaintiffs appeal and we affirm.

I.

In *Brandenburg v. Seidel,* 859 F.2d 1179 (4 Cir. 1988), we summarized the genesis of Maryland's savings and loan crisis, the steps taken by the Governor of Maryland and the General Assembly of Maryland to meet it, and the implementation of the legislative scheme by the designation of a single judge of the Circuit Court for Baltimore City to adjudicate all claims arising out of the conservator/receivership proceedings

1. The district court dismissed MDIF on Eleventh Amendment grounds and the correctness of its order is not challenged.

for failed savings and loan associations, including Old Court. Those facts need no repetition here.

Old Court, which was one of the first savings and loan associations to collapse, was placed into conservatorship on May 13, 1985 and withdrawals were immediately limited to no more than $1,000 for each consecutive 30-day period, with a few minor exceptions. On November 8, 1985 the conservatorship proceeding was converted into a receivership proceeding and MDIF was appointed receiver. MDIF has expressly stated that owners of certificates of deposit will not be compensated for interest accruing after November 8, 1985, and that for the period May 13 to November 8, 1985, interest will be paid at only the rates of 5½% per annum rather the higher rates prescribed in the certificates.

Since MDIF was appointed receiver, it has sued the former officers, directors and controlling persons of Old Court in the Circuit Court for Baltimore City alleging misdeeds closely paralleling those alleged in the instant case. In addition there are two overlapping depositor class actions against Old Court and its principals pending in that court. Finally, since the decision of the district court in the instant case, plaintiffs have filed a class action suit against defendants in the Circuit Court for Baltimore City alleging RICO and common law causes of action.

Two questions are presented by this appeal. We must decide first whether the certificates of deposit issued by Old Court are "securities" within the meaning of the Securities Exchange Act of 1934 so as to give rise to a cause of action on the facts alleged by the plaintiffs. Then we must decide, at least with respect to plaintiffs' alleged RICO cause of action, if the district court correctly concluded to abstain from decision and to dismiss the complaints.

II.

The Securities Exchange Act of 1934, 15 U.S.C. §78 *et seq.*, renders both unlawful and actionable fraudulent dealings in securities as alleged by plaintiffs. Jurisdiction is exclusively federal under the Act. The question here is whether the certificates of deposit issued by Old Court are "securities" within the meaning of that Act.

The Act defines "security" to mean, *inter alia*, "any note . . . bond, debenture . . . any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security; or in general, any instrument commonly known as a 'security' . . ." §78c(a)(10). Were we to confine ourselves to the statutory definition, we might well conclude that the certificates of deposit are "securities" as defined in the Act. However, as the Supreme Court has noted, these financial instruments "do not fit squarely within one of the enumerated specific kinds of securities listed in the definition." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 690 n.4 (1985).

In *Marine Bank v. Weaver*, 455 U.S. 551 (1982), the Court held that a long-term certificate of deposit issued by a bank insured by the Federal Deposit Insurance Corporation is not a "security" within the meaning of the Act. The rationale of *Marine Bank* was that the Act in defining the term "security" states that the definition is to be employed "unless the context otherwise requires." §78c(a). The Court concluded that the context did otherwise require when the certificate of deposit is issued by a federally insured bank because such a bank is "subject to the comprehensive regulations governing the banking industry," i.e., "[d]eposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws; advertising relating to the interest paid on deposits is also regulated [and] deposits are insured by the Federal

Deposit Insurance Corporation." 455 U.S. at 558 (footnotes eliminated). As a consequence, since the Act states that the inclusiveness of the definition of security should be limited when the context requires, the Court concluded:

> It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. We therefore hold that the certificate of deposit purchased by [plaintiffs] is not a security.

455 U.S. at 559 (footnote omitted).

We read *Marine Bank* to hold that the existence of a comprehensive regulatory and insurance system governing the issuer removes certificates of deposit issued by it from the general definition of "securities" contained in the Act. Specifically, we agree with the district court that there was a comprehensive regulatory and insurance system applicable to Old Court so that its certificates of deposit did not fall within the statutory definition. Maryland law vested supervisory authority over state-chartered savings and loan associations in the Director of the Division of Savings and Loan Associations, Md. Fin. Inst. Code. Ann. §8-303 (1980), and the Board of Savings and Loan Commissioners, *id.* §8-207. Deposits in the MSSIC member associations, of which Old Court was one, were insured by MSSIC, *id.* §10-103.

State statutes required Maryland chartered associations to maintain reserve accounts, *id.* 9-219, 9-327 (1980), to comply with periodic reporting, inspection and audit requirements, *id.* §§9-502-9-504, and conduct promotional activities in accordance with regulations promulgated by the Board of Savings and Loan Commissioners, *id.* §9-905. These statutes were supplemented by rules and regulations established by the Division of

Savings and Loan Associations as well as rules and regulations adopted by MSSIC and approved by the Division.

We recognize of course that in the case of Old Court and others, the Maryland system viewed in hindsight was ineffective. Whether the holders of Old Court's certificates of deposit will ever be paid in full is problematic even though Maryland has required the accumulation of interest thereon to be reduced. But we do not think that *Marine Bank* depends upon the effectiveness of the regulatory scheme as it may have been administered. " '[T]he nature of an instrument is to be determined at the time of issuance, not at some subsequent time' ", West v. Multibanco Commerex, S.A., 807 F.2d 820, 826 (9 Cir. 1987) (quoting Great Western Bank & Trust v. Katz, 532 F.2d 1252, 1255 (9 Cir. 1976)). At the time Old Court issued the certificates of deposit giving rise to this litigation, there had been no break down in Maryland's then regulatory scheme, and neither Old Court nor MSSIC was insolvent.

It is significant also that *Marine Bank* did not depend upon the complete effectiveness of the federal scheme. The failure of national banks, federally insured banks, federally chartered savings and loan associations, and federally insured savings and loan associations was known before and has been known after *Marine Bank* was decided. At the time *Marine Bank* was decided the maximum federal insurance was only $40,000 while the certificate of deposit in issue in that case was for $50,000, and Congress had not yet seen fit to place the government's full faith and credit behind the federal insurer.

Thus, we conclude that application of *Marine Bank* depends upon the comprehensiveness of the scheme of regulation, and by that test we think that the Maryland system qualified to render the certificates of deposit not "securities." There is also a practical reason for this conclusion. As the district court said:

> The Court is convinced that the Supreme Court did not intend to have lower courts engaging in an inquiry as to whether, at the time a given CD is issued, the regulatory and insurance schema in place was sufficiently well managed or well positioned to contend with a crisis that the CD should not be treated as a security. Such an inquiry could potentially lead to a court concluding that the same bank could one year issue a CD that was not a security, but that due to a change in effectiveness of the regulatory, insurance protection, the next year an identical CD would be a security.

We hold therefore that plaintiffs have no cause of action under the Securities Exchange Act of 1934 because the certificates of deposit owned by them are not "securities" within the meaning of the Act.

III.

The correctness of the district court's decision to abstain from deciding plaintiffs' RICO claims and to dismiss this aspect of the complaint warrants little discussion.

Subsequent to the district court's decision, we decided Brandenburg v. Seidel, *supra*. There we held with regard to First Maryland Savings and Loan Association, like Old Court, a financial institution which failed as part of the Maryland savings and loan debacle, that a RICO action could be instituted in a state court and that Maryland's "comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations," 859 F.2d at 1191, provided a proper basis for the district court to abstain under the authority of Burford v. Sun Oil Co., 319 U.S. 315 (1943).

We view *Brandenburg* as controlling here.[2]

AFFIRMED.

2. The holding in *Brandenburg* that state courts have jurisdiction of RICO actions is not one which has yet been determined by the Supreme Court. Counsel in the instant case agreed in oral argument that should this aspect of *Brandenburg* be overruled by the Supreme Court at some later date, plaintiffs may reinstate their RICO cause of action in the district court and defendants will not assert the defense of limitations.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MARYLAND

FRANCINE TAFFLIN, SEYMOUR ZUCKERMAN, ERIS ZUCKERMAN, RENALEE SELVIN, JOAN ZUCKERMAN, SYLVIA ZUCKERMAN, SEYMOUR ZUCKERMAN, GEORGE R. LYON, GEORGE C. LYON, PETER M. LYON, BRUCE K. LYON, ELIZABETH A. LYON, GEORGE R. LYON and MARY G. LATHROP (personal representatives of the estate of George M. Lyon), KENT H. BUTCHER, STANLEY Z. FELENSBERG, M.D. (personal representative of the estate of Minnie Felsenberg), MARGARET GRAVES, THURMAN GRAVES, SANDRA L. PLETKA	:	
plaintiffs	:	
– vs –		
JEFFREY A. LEVITT, LCP CORPORATION, ALLAN H. PEARLSTEIN, JEROME S. CARDIN, LIGHT STREET PARTNERSHIP, ALLEN FEINBERG, DAVID UHLFEDLER, ROBERT D. PEARLSTEIN, SAMUEL SHOUBIN, DENNIS E. GUIDICE, KAROL LEVITT, ROSEMARY PEARLSTEIN, OLD COURT SAVINGS AND LOAN, INC., MARYLAND SAVINGS SHARE INSURANCE CORP., MARYLAND DEPOSIT INSURANCE FUND CORP., CHARLES C. HOGG, II, PAUL R. TRICE, JR., GEORGE W.H. PIERSON, JEROME F. DOLIVKA, FRANCIS F. ANDERSON, MICHAEL J. DIETZ, LEONARD BASS, JOHN C. DONOHUE, SR., HENRY R. ELSNIC, JOHN D. FAULKNER, JR., JAMES D. LAUDEMAN, TERRY L. NEIFIELD, GLASS AND ASSOCIATES, P.A., CARDIN CARDIN, P.A.	:	DOCKET NO.: B87-668-684
	:	Baltimore, Maryland
	:	December 4, 1987
	:	3:40 p.m.
defendants	:	

PARITAL TRANSCRIPT OF RECORDED PROCEEDINGS

BEFORE THE HON. WALTER E. BLACK
UNITED STATES DISTRICT JUDGE

AUDIO OPERATOR: V. CAMERON

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING; TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE

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(Transcript of Court's opinion)

THE COURT: Good afternoon. Thank you all for returning. As I indicated before the recess. I am going to rule on these matters today by means of an informal oral opinion reserving the right to edit that opinion if it's transcribed for any reason.

The Court today has heard argument on three of the issues raised in the many motions to dismiss filed by virtually all of the Defendants in the two cases. The issues argued were (1) whether Plaintiffs have stated a claim upon which relief can be granted under the Securities Exchange Act of 1934: (2) whether Plaintiffs have stated a claim upon which relief can be granted under the Raceteer Influenced and Corrupt Organization Act and (3), whether the Court should dismiss the actions on abstention grounds.

The two actions before the Court were commenced by complaints filed on January 7, 1986, in the United States District Court for the Eastern District of Pennsylvania. On February 28, 1986, Judge James T. Giles ordered that the two cases be consolidated for the purpose of pretrial motions. On March 11, 1986, the two complaints were amended. On February 17, 1987, the consolidated cases were transferred to this Court.

The primary difference between the two complaints is that the Plaintiffs in Civil Action B-87-668 who are residents of Maryland are not Plaintiffs in Civil Action B-87-684, and that because Plaintiffs claim that all Defendants are Maryland residents, diversity jurisdiction along with federal question jurisdiction is asserted in B-87-684. All of the named Plaintiffs in both actions claim to be purchasers of Old Court Savings and Loan, Inc. certificates of deposit, who purchased or renewed these certificates between September, 1982 and May 13, 1985, all Plaintiffs also claim to have still held these securities, — oh, wow, that's a terrible mistake to make, — these certificates on May 13, 1985, when Old Court went into conservatorship, except that certain Maryland

Plaintiffs claim to have redeemed their certificates on or about May 9, 185, and suffered a penalty for early withdrawal. Having now noted the only distinctions between the two actions, for simplicity's sake the actions will be treated as one action for the purpose of discussion.

Plaintiffs assert claims under federal securities law (count 1), RICO (counts 2 and 3) and state law (counts 4 through 9). Plaintiffs seek compensatory, treble and punitive damages, costs, and fees for attorney's, accountants and experts from 29 separate Defendants. All Plaintiffs allege that the actions of the Defendants have deprived Plaintiffs of their money and the interest owing on that money. Certain Maryland Plaintiffs allege that Defendants actions forced them to seek early withdrawal of their money and sustain a penalty, while the remainder of the Plaintiffs allege that their money was in Old Court's possession at the Old — at the time Old Court went into conservatorship and that they have been deprived of that money. Plaintiffs have moved for class certification, purporting to represent all persons who purchased Old Court certificates of deposit between September 1, 1982 and May 13, 1985: and who either held such certificates on May 13, 1985, or who redeemed such certificates immediately prior thereto had suffered a penalty for early withdrawal.

It is critical to the resolution of the motions before the Court to understand what has been happening in the State of Maryland for the last two and a half years regarding the so-called "savings and loan crisis." In early May of 1985, a rumor broke out concerning the financial instability of Old Court. The rumor triggered a run at Old Court and a number of other savings and loans in Maryland. On May 13, 1985, the Maryland Saving Share Insurance Corporation ("MSSIC"), the private insurer of Maryland's' savings and loans, was made the conservator of Old Court by the Circuit Court for Baltimore City. On

May 14, 1985, then Governor Hughes issued an Executive Order declaring a state of public crisis and an emergency. Governor Hughes's order limited withdrawals from all MSSIC-insured savings and loans to a maximum of $1,000 per account, per thirty day period.

Upon Governor Hughes' order, the Maryland General Assembly sat for two special sessions between May 17 and May 28, 1985 and between October 17 and November 5, 1985, to enact emergency legislation. The legislation, – the legislature responded by passing a number of laws to contend with the crisis. See generally Maryland Financial Institution Code Annotated 9-109, – 9-101 to 10-119. Central to the legislative effort was the creation of the Maryland Deposit Insurance Fund ("MDIF"), a state-run savings and loan insurer. Section 10-102. Of particular importance to the case at bar are the sections of the emergency legislation that provide for MDIF to be appointed as conservator or receiver of troubled savings and loans and which provide for the jurisdiction and powers of the Maryland circuit court in administering the conservatorship or receivership. Sections 9-709 to 9-711.

MDIF, as the successor in interest to MSSIC, became the conservator of Old Court. Judge Joseph H. H. Kaplan of the Circuit Court for Baltimore City was assigned the matter of the Old Court conservatorship, and subsequently the Court of Appeals in Maryland made Judge Kaplan the one judge to adjudicate all disputes arising out of the receivership or conservatorship proceedings of Maryland Savings and Loan Associations. On November 5, – on November 8, 1985, Judge Kaplan converted the Old Court conservatorship proceeding into a receivership proceeding.

Of significance are two ongoing law suits before the Circuit Court for Balitmore City that were initiated prior to the case at bar. On June 6, 1985, some of the plaintiffs in this case, Thurman L. Graves, Margaret L. Graves and Sandra Pletka filed suit (hereafter referred to as the

Graves suit) against a number of Defendants in this case. The suit, while lacking a federal securities claim and a RICO claim, bears a very strong resemblance in terms of wrongs alleged to this case. Moreover, a class action has been certified in the Graves suit with the class consisting of "all persons presently owning certificates, savings accounts, PA accounts, checking accounts and other forms of investments issued by Old Court." All Plaintiffs in this case, therefore, can be members of the Plaintiff class in the Graves sit. A suit has also been brought by MDIF in its capacity as conservator of Old Court against Old Court's officers, directors, stockholders, lawyers, controlling persons, subsidiaries and affiliates, many of whom are Defendants herein. The suit asserts many of the state law claims asserted in the case before this Court. More recently, MIDIC has brought a separate action as Old Court's receiver against the former MSSIC officers and directors.

Having detailed the procedural history of this case and the regulatory actions taken by the State of Maryland through all three of its branches of government in the wake of the collapse of Old Court, the Court now turns its attention to the issue of whether Plaintiffs have stated a claim upon which relief can be granted under the Securities Act. The answer to this question is entirely dependent on the answer to another question: are the certificates of deposit purchased by Plaintiffs from Old Court securities?

Whether an instrument is a security or not under the Securities Exchange Act of 1934 is a matter of statutory interpretation. While the definition of security in the Act is quite broad and was clearly intended to cover a wide range of financial instruments, it is unclear from the face of the statute and from the legislative history whether certificates of deposit were intended to be construed as securities. Of course, the court is referring to 15 United States Code Section 78c(a)(10). The Court's analysis of the problem begins with the

Supreme Court decision in *Marine Bank v. Weaver,* 455 U.S. 551 (1982), which both sides argue as being dispositive in favor of their respective positions.

In *Weaver* the Supreme Court was faced with the question of whether certificates of deposit, – of deposit issued by a federally regulated bank and insured by the Federal Deposit Insurance Corporation (FDIC) are securities under the Securities Exchange Act of 1934. The Supreme Court approached the issue by noting first that the Court of Appeals had concluded that a certificate of deposit is similar to any other long-term debt obligation commonly found to be a security. The Supreme Court plainly disagreed with this conclusion, at least with respect to certificates of deposit from federally regulated banks.

Quoting, the Court of Appeals also concluded that a certificate of deposit is similar to any other long-term debt obligation commonly found to be a security. In our view, however, there is an important difference between a bank certificate of deposit and other long-term obligations. This certificate of deposit was issued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry. Deposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws, advertising relating to the interest paid on deposits is also regulated. In addition, deposits are insured by the Federal Deposit Insurance Corporation. Since it's formation in 1933, nearly all deposits in failing banks insured by the FDIC have received payment in full, even payment for the portions of their deposits above the amount insured. We see, therefore, important differences between a certificate of deposit purchased from a federally regulated bank and other long-term obligations.

Quoting from page 558 and 559. The importance of these differences, according to the Supreme Court, is that the purchaser of a certificate of deposit from a

federally regulated, federally insured bank, quote, is virtually guaranteed payment in full, whereas the holder of an ordinary long term debt obligation assumes the risk of the borrower's insolvency. Quoting again from page 559.

The Supreme Court then went on to explain why this disparity in risk between federally regulated and insured certificates of deposit and ordinary long term debt obligations affected the issue of whether the certificate of deposit at issue in *Weaver* was a security.

Quoting, the definition of security in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires. It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. We therefore hold that the certificate of deposit purchased by the Weavers is not a security.

The Supreme Court's determination that the context of federal banking law regulatory and insurance protection for the certificate of deposit in question brought an instrument which it hinted, quote, seems to fall within the broad sweep of the Act and therefore seems to be a security, outside of the sweep of the Act and therefore not a security, represents a new approach to the often litigated issue of whether a particular instrument is a security. Prior to the *Weaver* decision, the Court limited its review to whether the instrument itself fell within the ordinary concept of a security, as contemplated in the 1934 Act. See United States,– *United Housing Foundation v. Forman,* 421 U.S. 837 (1975). *SEC versus United Benefit Life Insurance,* 387, U.S. 202 (1967)

It is important to recognize that in *Weaver* the Supreme Court did not face the question of whether,

federal regulatory and insurance context aside, certificates of deposit are securities. Instead the Court opted to proceed directly to the analysis of whether context otherwise required,– I've lost my place. Well, strike that sentence. The Court did not say that were it not for the context of federal regulation and insurance, a certificate would be a security nor did the Court say that all certificates of deposit were securities. The Court did leave the following telling footnote: "It does not follow that a certificate of deposit invariably falls outside the definition of a security as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question. The purposes intended to be served and the factual setting as a whole. Quoting from the footnote number eleven of page 561.

Since the *Weaver* decision, a number of lower federal courts have made determinations whether particular certificates of deposit are securities. See *Wolf versus Banco Nacional de Mexico, S.A.,* 739 F.2d 1458 (9th Circuit 1984); Cert. Denied 469 U.S. 1108; *Brockton Savings Bank v. Peat, Marwick, Mitchell and Company;,* 577 F.Supp. 1281 (District of Massachusetts 1983). In both *Wolf* and *Brockton Savings,* the courts found the *Weaver* decision to be controlling, and held that the certificates of deposit were not securities. In *Brockton Savings* the material facts were essentially the same as those in *Weaver;* the certificate of deposit was issued by a federally regulated bank insured by the FDIC. In *Wolf,* however, the court was faced with a certificate of deposit issued by a Mexican bank. The court in *Wolf* concluded that the crux of the Supreme Court decision in Weaver was the Court's conclusion that repayment of the certificate of deposit was virtually guaranteed due to the comprehensive regulation and that the Court did not limit its holding to the context of federal regulation. Thus, upon finding that the Mexican government's regulations provide holders of certificates

of deposit from Mexican banks with as much protection as does the federal system in this country the court held the Mexican issued certificates of deposit were not securities.

The only post *Weaver* case known to the Court where it was determined that the certificate of deposit in question was a security is *Gary Plastic Packaging Corporation versus Merrill Lynch, Pierce, Fenner & Smith,* 756 F.2d 230 (2d Circuit 1985). The plaintiff in *Gary Plastic* brought an action against an investment firm through which the Plaintiff had invested in a number of certificates of deposit. Merrill Lynch had an established CD program where it arranged to have banks create new CD offerings that carried interest rates lower than those they paid their direct customers and from this differential Merrill Lynch received a commission for its services which it used in part to cultivate a secondary market of borrowers. The investment purchased through Merrill Lynch had a fluctuating interest rate, depending on the Merrill Lynch's ability to orchestrate the selling of money to numerous banks. Thus, the court concluded that unlike a conventional CD, the success of the CD's bought through Merrill Lynch depended in part on Merrill Lynch's managerial expertise.

Faced with these facts and the question of whether the CD's purchased by Merrill Lynch for its investors were securities, the court applied the *Weaver* decision as Plaintiff would have this court do. After concluding that the similarity of the facts in the two cases mandated that *Weaver* be dispositive of the issue of whether the CDs were securities, the court held that because there was a significant risk of loss in investing in Merrill Lynch's CD program, unlike the CD in issue in *Weaver,* the CDs must be construed as securities. And while the court also concluded that the CDs at issue were securities under a more conventional analysis, the courts opinion centered on its construction of the holding in *Weaver.* Siting pages 238 to 242.

This Court cannot accept the construction of the holding in *Weaver* reached by the Second Circuit in *Gary Plastic*. It does not appear from the *Weaver* decision that the Supreme Court contemplated lower courts determining whether a CD is or is not a security solely on the basis of the risk of the investment. The Supreme Court established that a secure regulatory and insurance scheme was a context that mandated that a CD protected by such a scheme is not a security. The Court simply did not say that in the absence of such a scheme a CD is a security.

In *Burrus, Cootes and Burrus versus MacKethan,* 537 F.2d 1262, affirmed on rehearing, 5454 F.2d 1388 (4th Circuit 1976) *Cert. denied,* 434 U.S. 1018, the Fourth Circuit was faced with the issue of whether a certificate of investment issued by a savings and loan corporation was a security under the 1934 Act. In an opinion written by Senior District Judge Wyzanski, sitting by designation, the Fourth Circuit found the certificates of investment, a term of art used officially by the State of Virginia to describe a set of financial instruments to be essentially the same things as a passbook account or a certificate of deposit, in that the certificate, quote, embodies a contract by the corporation to pay interest at a fixed rate, unrelated to the profits of the corporation. Quoting from page 1264.

Having equated the certificate of investment with a certificate of deposit, Judge Wyzanski went on to analyze whether a certificate by either name, given their like characteristics, was a security under the 1934 Act. The court found the following passage from the Fifth Circuit opinion of *Bellah v. First National Bank,* 495 F.2d 1109 (5th Circuit 1974) to be persuasive.

Quote, Section 78c(a)(10) of the Securities Exchange Act of 1934 includes as security a certificate of deposit, for security. Under the judicial gloss placed on this language, a certificate of deposit issued in exchange for currency is not encompassed with in the section

because currency is not a security. Quoting from page 1264 and in turn quoting from *Bellah,* page 1114.

In addition to accepting this construction of the 1934 Act, Judge Wyzanski offered the following reasoning.

A certificate of deposit is far more like commercial paper than any other obligation. Not only is it payable in dollars according to its terms either on demand or at a fixed future date, but what the payee receives is principal and interest at a stipulated rate. In no aspect is the obligation keyed to the profitability of the obligor's enterprise or to his skill. Were a certificate of deposit to be treated as a security there would be superimposed on an already existing pattern of federal or state banking or like regulations which govern banks, trust companies, savings and loan associations, and other institutions for deposit of currency, a further, and perhaps not wholly suitable, patterns of regulations by the SEC. There is no indication in the text of the statute, nor in a Congressional committee report, nor even in a legislator's speech on the floor that Congress intended to provide for an overlap with all its risks of inter-agency conflict and of the SEC's want of specialized relevant expertise in this particular field of banking. Quoting from 1265. Accordingly, the Fourth Circuit in *Burrus, Cootes* found that the certificate of investment at issue were not a security under the 1934 Act.

The Court must decide whether the Supreme Court's decision in *Weaver* requires a different outcome than that reached by the Fourth Circuit in *Burrus, Cootes*. For absent in the *Weaver* decision, the holding in *Burrus, Cootes* would clearly be controlling authority in the present case. As discussed earlier in the opinion, the Supreme Court never reached the question of whether, excluding the regulatory and insurance context, a certificate of deposit is a security, although the Court did hint that a CD fell within the broad sweep of the act. As evidence by its final footnote, the Supreme

Court apparently intended to confine the direct holding of *Weaver* to its facts; that a CD issued by a federally regulated, FDIC insured bank is not a security. Footnote eleven instructs that other instruments, like the instruments in question in this case, be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole. Such an inquiry, this Court maintains is precisely what Judge Wyzanski undertook in *Burrus, Cootes*. Thus, it is the opinion of this Court that the holding in *Burrus, Cootes* remains good law, at least for the purposes of this case. After the Supreme Court decision in *Weaver,* and it is therefore controlling authority on the issue of whether the CDs at issue in this case are securities. The fact that the CDs in the present case may have been marketed in a more aggressive manner than is typical or the fact that Old Court was using the money it received from CD purchasers for unconventional purposes, does not alter the impact of the Fourth Circuit's analysis in *Burrus, Cootes* which focused on the nature of the intrinsic nature of the instrument. Thus, because the CDs in issue are not securities under the Securities Exchange Act of 1934, Plaintiff's securities claim in count one of the complaint will be dismissed.

In the alternative, the Court also holds that the CDs at issue are not securities, and therefore the federal securities claim must be dismissed, on the theory that the *Weaver* opinion, itself, is properly read to mandate that the Old Court CDs are not securities. The Court accepts the interpretation of *Weaver* offered by the Defendants that a CD is not a security, if, at the time it is issued, the bank, or in this case the savings and loan, is regulated and insured in a manner not unlike the federal system. Referring to *West v. Multibanco Comermex, S.A.,* 807 F.2d 820 (9th Circuit, 1987). The Court is convinced that the Supreme Court did not intend to have lower courts engaging in an inquiry as to whether

at the time a given CD is issued, the regulatory and insurance schema in place was sufficiently well managed or well positioned to contend with a crisis that the CD should not be treated as a security. Such an inquiry could potentially lead to a court concluding that the same bank could one year issue a CD that was not a security, but that due to a change in effectiveness of the regulatory, insurance protection, the next year an identical CD would be a security.

Having dismissed the securities claim, the Court will proceed directly to the issue of abstention rather than engage in an analysis of the validity of the RICO claims For the Court is of the opinion that the state courts enjoy concurrent jurisdiction over RICO claims, thus making abstention a far more viable option. Courts are divided on the issue, but his Court adopts the view arrived at by Judge Smalkin in his detailed analysis of the subject in *Brandenburg v. First Maryland Savings and Loan*, 660 F. Supp. 717 (District of Maryland 1987). The law presumes that the state courts enjoy concurrent jurisdiction over federal claims unless Congress dictates otherwise, either directly or indirectly, or unless there is a clear incompatibility between the exercise of state court jurisdiction and federal interest *Gulf Offshore Oil Company versus Mobil Oil Company*, 453 U.S. 473,– 478 (1981). Because there is nothing in the statutory language or the legislative history of RICO that can be interpreted to exclude the state courts from jurisdiction over RICO claims and no clear incompatibility with federal interests, the Court sees no reason to rebut the presumption of concurrent jurisdiction. I am referring to *Brandenburg*, 660 F. Supp. at 730 through 734; *HMK Corporation v. Walsy,* 637 F. Supp. 710 (Eastern District of Virginia 1986)

Defendants argue that the Court should abstain from hearing the case at bar in accordance with the following three abstention doctrines: *Burford* abstention, as set forth,– first set forth in *Burford versus Sun*

Oil Company, 319 U.S. 315 (1943); *Colorado River* abstention, as first set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); the *Younger* abstention, as first set forth in *Younger v. Harris*, 401 U.S. 37 (1971). The Court will address each of the three doctrines in turn.

Under *Burford* abstention, a federal court should abstain from exercising jurisdiction where to do so would result in unwarranted friction with the state administration of purely local affairs. Quoting from *Burford*, at 332. As the Fourth Circuit recently noted, the salient feature in *Burford* was that in addition to extensive state regulation of a field, the State has established its own elaborate review system for dealing with the geological complexities to, – of oil and gas fields by concentrating judicial oversight in specially authorized state courts. *Education Services, Inc. v. Maryland State Board for Higher Education*, 710 F.2d 170, 173 (4th Circuit 1983), quoting *Colorado River*, at page 815).

In the present case Defendants assert that to allow Plaintiffs to proceed in federal court against Defendants who either are already involved in the ongoing Old Court receivership proceedings in state court or who will potentially become involved would disrupt the complex regulatory scheme imposed by the Maryland State Assembly and the state judiciary. This Judge was held once before that *Burford* abstention was appropriate in light of the regulatory framework created by the State Assembly and the consolidation efforts made by the state judiciary to contend with the savings and loan crisis and its aftereffects, see *Northern Virginia Law School, Inc. v. Harry Hughes*, B-85-2300 (District of Maryland November 22, 1985), and the Court sees no reason to reach a different conclusion in this case. In the present case MDIF, Old Court's receiver, in accordance with the emergency legislation has brought law suits in state court against the directors of Old Court and more

recently against the former directors of MSSIC. Thus, a large number of Defendants in this case are Defendants in the state court suits filed by MDIF. If the Plaintiffs are allowed to proceed in this action, they will have circumvented the receivership process. Moreover, any money awarded to Plaintiffs would potentially reduce the available funds to satisfy a judgment in favor of depositors in the receiver proceeding. And the Court was referring once again to the *Brandenburg* opinion of page 729.

This Court is also of the opinion, as it was in *Northern Virginia Law School*, that as an alternative basis of abstention the Court should abstain from consideration of this case under *Colorado River* abstention. Under *Colorado River* abstention, as recently expanded upon in *Moses H. Cone Memorial Hospital versus Mercury Construction Company, – Corporation*, 460 U.S. one (1983), a federal court considering abstaining on the grounds of wise judicial administration in light of pre-existing state court proceedings should take the following factors into account: (a) the assumption by a state court of jurisdiction over property; (b) the inconvenience of the federal forum; (c) the avoidance of piecemeal litigation; (d) the order in which concurrent forums obtained jurisdiction; (e) whether the source of law is federal or state; and (f) the adequacy of the state court proceedings to protect the federal plaintiff's rights. See also, *Kruse v. Snowshoe Company*, 715 F.2d 120, 123 (4th Circuit 1983). The Supreme Court has offered the following methodology for employing these factors:

The decision whether to dismiss a federal action because of parallel state court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighed in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case. Quoting from *Cone*, at page 17.

Applying these factors, it is apparent that only factor (e) weighs against abstention, in that one of the claims asserted by the Plaintiffs is a federal claim. Because the Court has ruled that federal courts do not have exclusive jurisdiction over RICO claims, and because the RICO claims in the present suit are essentially state fraud claims, the Court does not find that factor (e), or for that matter factor (f), which requires the Court to consider the adequacy of the state court proceedings to protect the federal right, weigh heavily against abstention.

Factors (a), (b), (c), and (d) all support abstention. First, through the institution of conservatorship receivership proceedings, the state court has assumed jurisdiction over much of the property in issue. The MDIF as Old Court's receiver is attempting to recover all money due Old Court and ultimately Old Court depositors like the Plaintiffs in this action. Secondly, it would be inconvenient to let this action proceed in federal court given the progress inevitably made at the state level given that MDIF has been serving as Old Court's receiver since November of 1985. Third, and most significantly, to allow this action to proceed would be to allow exactly the sort of piecemeal litigation that *Colorado River* abstention was created to avoid. As previously noted in the discussion of *Burford* abstention, any proceeding in this case would disrupt the comprehensive scheme for resolving the savings and loan crisis imposed by the state legislature and judiciary, and create complications with the ongoing state litigation brought by Old Court's receiver MDIF. Fourth, the state court receivership action against the Old Court directors was brought six months before this action.

It is this Court's position that the *Colorado River* factors point clearly in the direction of abstention primarily due to the considerable weight this Court attaches to the importance of avoiding piecemeal litigation in this instance. The Court reaches this decision even considering the fact that the balance must from the onset by

heavily weighted in favor of the exercise of jurisdiction. Quoting again from *Cone,* of 17.

Abstention will not be granted under the doctrine established in *Younger v. Harris.* While *Younger* abstention has been applied with respect to non criminal state proceedings, see *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982), the Court is not aware of any instance where *Younger* abstention has been applied when the Plaintiff is not seeking to directly block a state proceeding. If *Younger* abstention were allowed in this situation, the Court would essentially be equating *Younger* abstention with *Colorado River* abstention, but without the carefully considered factors articulated by the Supreme Court in *Colorado River* and *Cone* that limit the application of *Colorado River* abstention.

Accordingly, abstention is proper under both *Burford* and *Colorado River.* And Defendants' motions to dismiss are hereby granted.

Counsel I will enter a formal order in each case in conformity with this opinion. Thank you very much.

THE CLERK: Please rise. This Court is now in recess.

(Court stands in recess)

* * *

I, EILEEN KANE, do certify that the foregoing is a correct transcript of the proceedings in the matter of Tafflin, et al. versus Levitt, et al.

1/25/88 Eileen Kane

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANCINE TAFFLIN, SEYMOUR ZUCKERKMAN, ERIS ZUCKERMAN, RENALEE SELVIN, JOAN ZUCKERMAN, SYLVIA ZUCKERMAN, SEYMOUR ZUCKERMAN, etc., GEORGE R. LYON, GEORGE C. LYON, PETER M. LYON, BRUCE K. LYON, ELIZABETH A. LYON, GEORGE R. LYON and MARY G. LATHROP, etc., KENT H. BUTCHER, STANLEY Z. FELSENBERG, etc., MARGARET GRAVES, THURMAN L. GRAVES, SANDRA L. PLETKA

v.

JEFFREY A. LEVITT, LCP CORPORATION, ALLAN H. PEARLSTEIN, JEROME S. CARDIN, LIGHT STREET PARTNERSHIP, ALLEN FEINBERG, DAVID UHLFELDER, ROBERT D. PEARLSTEIN, SAMUEL SHOUBIN, DENNIS E. GUIDICE, KAROL LEVITT, ROSEMARY PEARLSTEIN, OLD COURT SAVINGS & LOAN, INC., MARYLAND SAVINGS SHARE INSURANCE CORP., MARYLAND DEPOSIT INSURANCE FUND CORPORATION, CHARLES C. HOGG, II, PAUL B. TRICE, JR., GEORGE W. H. PIERSON, JEROME F. DOLIVKA, FRANCIS F. ANDERSON, MICHAEL J. DIETZ, LEONARD BASS, JOHN C. DONOHUE, SR., HENRY R. ELSNIC, JOHN D. FAULKNER, JR., JAMES D. LAUDEMAN, TERRY L. NEIFELD, GLASS AND ASSOCIATES, P.A., CARDIN AND CARDIN, P.A.

CIVIL NO. B-87-668

FILED ENTERED
LODGED RECEIVED

DEC 9 1987

AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

ORDER

In accordance with the Court's oral opinion rendered at the conclusion of the hearing held on December 4, 1987, IT IS, this 8th day of December, 1987, by the United States District Court for the District of Maryland,

ORDERED:

(1) That the motions filed by the defendants in support of dismissal on the grounds of abstention BE, and the same hereby ARE, GRANTED;

(2) That the Complaint BE, and the same hereby IS, DISMISSED WITHOUT PREJUDICE; and

(3) That the Clerk shall mail a copy forthwith to counsel of record.

Walter E. Black, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

*

FRANCINE TAFFLIN, SEYMOUR ZUCKERMAN, ERIS ZUCKERMAN, RENALEE SELVIN, JOAN ZUCKERMAN, SYLVIA ZUCKERMAN, SEYMOUR ZUCKERMAN, etc., GEORGE R. LYON, GEORGE C. LYON, PETER M. LYON, BRUCE K. LYON, ELIZABETH A. LYON, GEORGE R. LYON and MARY G. LATHROP, etc.,

*

v.

JEFFREY A. LEVITT, LCP CORPORATION, ALLAN H. PEARLSTEIN, JEROME S. CARDIN, LIGHT STREET PARTNERSHIP, ALLEN FEINBERG, DAVID UHLFELDER, ROBERT D. PEARLSTEIN, SAMUEL SHOUBIN, DENNIS E. GUIDICE, KAROL LEVITT, ROSEMARY PEARLSTEIN, OLD COURT SAVINGS & LOAN, INC., MARYLAND SAVINGS SHARE INSURANCE CORP., MARYLAND DEPOSIT INSURANCE FUND CORPORATION, CHARLES C. HOGG, II, PAUL B. TRICE, JR., GEORGE W. H. PIERSON, JEROME F. DOLIVKA, FRANCIS F. ANDERSON, MICHAEL J. DIETZ, LEONARD BASS, JOHN C. DONOHUE, SR., HENRY R. ELSNIC, JOHN D. FAULKNER, JR., JAMES D. LAUDEMAN, TERRY L. NEIFELD, GLASS AND ASSOCIATES, P.A., CARDIN AND CARDIN, P.A.

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CIVIL NO. B-87-684

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FILED ENTERED
LODGED RECEIVED

DEC 9 1987

AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

ORDER

In accordance with the Court's oral opinion rendered at the conclusion of the hearing held on December 4, 1987, IT IS, this 8th day of December, 1987, by the United States District Court for the District of Maryland,

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(3) That the Clerk shall mail a copy forthwith to counsel of record.

Walter E. Black, Jr.
United States District Judge

FILE COPY

JUDGMENT

UNITED STATES
COURT OF APPEALS
for the Fourth Circuit

No. 88-3019

FRANCINE TAFFLIN; SEYMOUR ZUCKERMAN; ERIS ZUCKERMAN; RENALEE SELVIN; JOAN ZUCKERMAN; SYLVIA ZUCKERMAN; SEYMOUR ZUCKERMAN, Executor of the Estate of Samuel Zuckerman; GEORGE R. LYON; GEORGE C. LYON; PETER M. LYON; BRUCE K. LYON; ELIZABETH A. LYON; GEORGE R. LYON; MARY G. LATHROP, Personal Representatives of the Estate of GEORGE M. LYON; KENT H. BUTCHER; STANLEY Z. FELSENBERG, M.D., Personal Representtive of the Estate of Minnie Felsenberg; MARGARET GRAVES; THURMAN L. GRAVES; SANDRA L. PLETKA; GERTRUDE DURSO; ENTERPRISE EQUIPMENT CO., INC.; CARMEN R. GOLDINGS; CLELIA S. GOLDINGS; ETHAN D. GOLDINGS; HERBERT J. GOLDINGS, MD; SARAH M. GOLDINGS; DORIS KONIG; WINDELL R. CARTER; CATHERINE CARTER; MITCHELL W. LANDY; RIO GRANDE SAVINGS & LOAN ASSOC

Plaintiffs-Appellants

v.

JEFFREY A. LEVITT; LCP CORPORATION; ALLAN H. PEARLSTEIN; JEROME S. CARDIN; LIGHT STREET PARTNERSHIP; ALLEN FEINBERG; ROBERT D. PEARLSTEIN; SAMUEL SHOUBIN; DENNIS E. GUIDICE; KAROL LEVITT; ROSEMARY PEARLSTEIN; OLD COURT SAVINGS & LOAN, INC; MARYLAND SAVINGS SHARE INSURANCE CORP.; MARYLAND DEPOSIT INSURANCE FUND CORPORATION; CHARLES C. HOGG, II; PAUL B. TRICE, JR.; GEORGE W. PIERSON, H.; JEROME F. DOLIVKA; FRANCIS F. ANDERSON; MICHAEL J. DIETZ;

LEONARD BASS; JOHN C. DONOHUE, SR.; HENRY R. ELSNIC; JOHN D. FAULKNER, JR.; JAMES D. LAUDEMAN; TERRY L. NEIFELD; GLASS AND ASSOCIATES, P.A.; CARDIN AND CARDIN, P.A.

Defendants-Appellees

No. 88-3020

FRANCINE TAFFLIN; SEYMOUR ZUCKERMAN; ERIS ZUCKERMAN; RENALEE SELVIN; JOAN ZUCKERMAN; SYLVIA ZUCKERMAN; SEYMOUR ZUCKERMAN, Executor of the Estate of Samuel Zuckerman; GEORGE R. LYON; GEORGE C. LYON; PETER M. LYON; BRUCE K. LYON; ELIZABETH A. LYON; GEORGE R. LYON; MARY G. LATHROP, Personal Representatives of the Estate of George M. Lyon; GERTRUDE DURSO; ENTERPRISE EQUIPMENT CO., INC.; CARMEN R. GOLDINGS; CLELIA S. GOLDINGS; ETHAN D. GOLDINGS; HERBERT J. GOLDINGS, MD; SARAH M. GOLDINGS; DORIS KONIG; WINDELL R. CARTER; CATHERINE CARTER; MITCHELL W. LANDY; RIO GRANDE SAVINGS & LOAN ASSOC

Plaintiffs-Appellants

v.

JEFFREY A. LEVITT; LCP CORPORATION; ALLAN H. PEARLSTEIN; JEROME S. CARDIN; LIGHT STREET PARTNERSHIP; ALLEN FEINBERG; ROBERT D. PEARLSTEIN; SAMUEL SHOUBIN; DENNIS E. GUIDICE; KAROL LEVITT; ROSEMARY PEARLSTEIN; OLD COURT SAVINGS & LOAN, INC; MARYLAND SAVINGS SHARE INSURANCE CORP.; MARYLAND DEPOSIT INSURANCE FUND CORPORATION; CHARLES C. HOGG, II; PAUL B. TRICE, JR.; GEORGE W. PIERSON, H.; JEROME F. DOLIVKA; FRANCIS F. ANDERSON; MICHAEL J. DIETZ; LEONARD BASS; JOHN C. DONOHUE, SR.; HENRY R. ELSNIC; JOHN D. FAULKNER, JR.; DAVID UHLFELDER; JAMES D. LAUDEMAN; TERRY L. NEIFELD; GLASS AND ASSOCIATES, P.A.; CARDIN AND CARDIN, P.A.

Defendants-Appellees

APPEALS FROM the United States District Court for the District of Maryland, at Baltimore.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland at Baltimore and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,

Affirmed.

John M. Greacen
CLERK

TEXT OF FEDERAL STATUTES INVOLVED

Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10), provides:

> (a) When used in this chapter, unless the context otherwise requries—
>
> (10) the term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1964(c), provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter

may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.